In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 823

SYLVESTER RILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A), is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1970. The petition for a writ of certiorari was filed on October 8, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the marihuana introduced into evidence was unlawfully seized.

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2. Whether the court erred in admitting into evidence recordings of a telephone conversation made with the consent of one of the parties to the conversation.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner and co-defendant Brown were convicted of knowingly receiving, concealing, and facilitating the transportation and concealment of marihuana in violation of 21 U.S.C. 176a. Petitioner was sentenced to five years' imprisonment and the court of appeals affirmed *per curiam*.

The evidence showed that on February 19, 1969, one Lawrence Porter and another were placed under arrest in Calexico, California for conspiracy to smuggle heroin into the United States. After being informed of his constitutional rights, Porter admitted that the heroin was his (Tr. 237); he told agent Miller that he had been paid $250 by "Teddy Riley" to drive a car into Mexico, leave it there to be loaded with marihuana, and then pick it up later at a spot located in Calexico, California (Tr. 89–91, 237–240). He was to drive the car to Los Angeles and call a telephone number provided by petitioner Riley (Tr. 89–91, 237–240).

Porter agreed to cooperate with the government and deliver the contraband pursuant to his original instructions. He further agreed that the agents could fit him with a radio transmitter to record conversa-

tions with his contact and that the agents could record any of his telephone conversations (Tr. 91–92, 241).

Subsequently, the "loaded" car was found parked at the Calexico location given by Porter (Tr. 93), and was seized by two agents. Agent Miller and Porter drove the vehicle to Los Angeles where Porter was outfitted with a radio transmitter; they then proceeded to a telephone booth and Porter called the number in his possession. This conversation was recorded and played at the trial (Tr. 167–169, 249). Porter recognized the other voice as that of Brown (Tr. 243–244).[1]

After the telephone conversation, Porter drove the car to a house where he met petitioner and co-defendant Brown. Agents monitored the conversations held between the three men; later petitioner and Porter left the house together. Petitioner drove home and was arrested at that time (Tr. 389–392, 415–420). Brown was arrested after he had driven the "loaded" car to a garage.

The court did not permit agent Miller to testify as to what he heard with the aid of the monitoring device, saying that the tape should be played rather than permitting testimony as to somebody's interpretation (Tr. 386). The recording of the conversation between Porter and the two defendants was, how-

[1] During the trial the court instructed the jury that since petitioner was not part of this telephone conversation no part of it could be held against him (Tr. 247). Similar admonitions were given on two other occasions (Tr. 252, 364).

ever, almost entirely inaudible (Tr. 356–357) and therefore the full tape was not played at the trial (Tr. 385–386).

ARGUMENT

1. Petitioner claims that the marihuana introduced into evidence was unlawfully seized and therefore inadmissible against him. The marihuana was first seized in Calexico after Porter had told the agents that the car was "loaded" and had given them the location of the automobile. It was replaced in the car and was then seized after Brown's arrest. On both occasions the agents had authority to seize the marihuana which was known to have been smuggled into the United States. *Chambers* v. *Maroney*, 399 U.S. 42; *Carroll* v. *United States*, 267 U.S. 132.

2. Petitioner further contends that use of the tape recordings violated his Fourth Amendment rights. Since the tape recording of the conversation between the informant and defendants prior to their arrest was not actually utilized at trial, and since the court did not permit government testimony relating to the overhearing of that conversation on a Kel device, the main issue involves use of recordings of a telephone conversation between co-defendant Brown and the informer, made with the latter's consent.

Aside from the issue of standing,[2] petitioner errs in his assumption that the ruling in *United States* v.

[2] In instructing the jury not to consider the conversation against petitioner, the court went further than necessary since the act of Brown in making arrangements was in furtherance of the joint venture.

White, 405 F. 2d 838, certiorari granted, 394 U.S. 957, No. 13, this Term, governs the determination here. Expectations of privacy as to telephone conversations are significantly less than in face-to-face conversation with another individual. A person who talks over the telephone must be deemed to assume a reasonable risk that the other party is either recording the conversation or allowing another person to listen, either on the same earpiece or on an extension. See, *e.g.,* the government's briefs in opposition in the following cases: *Fukumoto* v. *United States,* No. 1359 Misc., O.T. 1969, certiorari denied, 397 U.S. 998; *Lopez* v. *United States,* No. 5053 this Term; *Hudson* v. *United States,* No. 5795, this Term; *Trigg* v. *United States,* No. 5894, this Term. Accordingly, there is no need to hold this case pending decision in *White.*

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
MICHAEL C. SLONSKY,
Attorneys.

NOVEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970